167

Clerk's Office

SUPREME COURT OF THE UNITED STATES.

No. 224.

MELVIN L. GRAY, PLAINTIFF IN ERROR,

vs.

G. D. WYMAN ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

GOVERNMENT PRINTING OFFICE.

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its own costs
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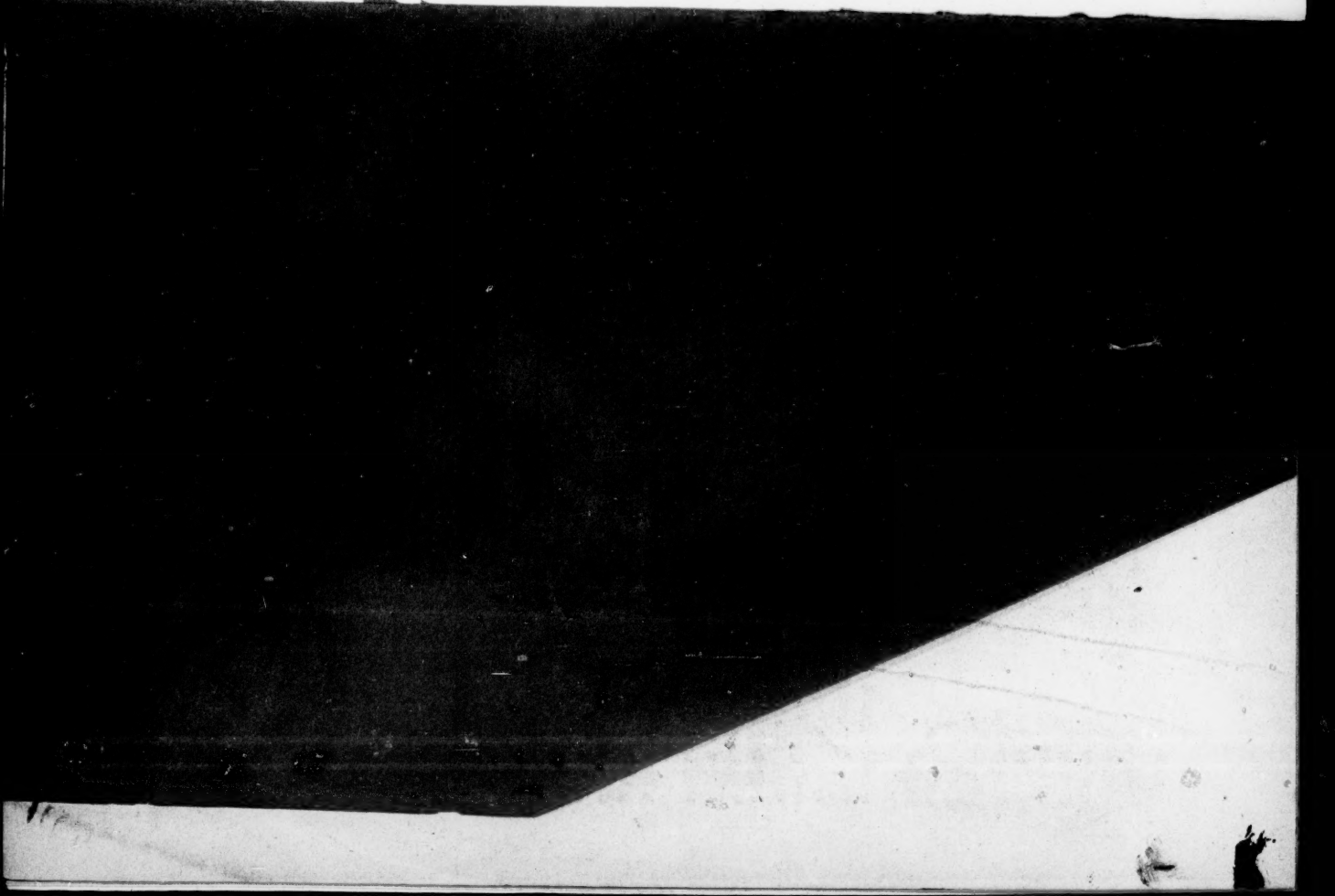

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INDEX.

	Original.	Print.
Complaint	2	1
Summons	6	3
Pleas of defendants	10	4
Demurrer to defendants' pleas	13	5
Joinder in demurrer	15	6
Order to enter judgment on demurrer	17	7
Substitution of defendants' attorney	18	7
Judgment on demurrer	19	8
Order to amend complaint	20	8
Agreement to amend complaint	21	8
Substitution of defendants' attorney	22	9
Proceedings in court	23	9
Proceedings in court	25	10
Proceedings in court	26	11
Proceedings in court	27	11
Judgment	28	11
Bill of exceptions	31	13
Precipe for writ of error	66	25
Citation	67	25
Bond on writ of error	68	26
Clerk's certificate	71	27
Writ of error	72	27
Citation and service	75	28
Assignment of errors	77	28

1 UNITED STATES OF AMERICA,
Northern District of California, ss:

Pleas before the judges of the circuit court of the United for the districts of California, in and for the northern district of said State, at the court-house in the city of San Francisco, on the 8th day of April of the extra April term, A. D. 1861.

Witness:

HON. M. HALL McALLISTER, *Circuit Judge.*
HON. OGDEN HOFFMAN, *District Judge.*

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

Be it remembered that at the extra April term, A. D. 1861, before the honorable the judges of said court, at the court-house in the city of San Francisco, came Melvin L. Gray, by James B. Townsend and S. M. Bowman, esqrs., his attorneys, and brought into said court, before the aforesaid judges thereof, his certain bill, complaint or declaration against G. D. Wyman, J. D. Arthur, Robert O. Sturdevant, John Nightingale, John McComb, Wm. B. Peake, J. L. Chamberlain, John Doe, Richard Roe and John Smith, defendants, which said complaint was filed on the 11th day of September, A. D. 1855, and follows in these words, that is to say:

2 *Complaint.*

In the circuit court of the United States for the districts of California.

MELVIN L. GRAY, plaintiff, *vs.* G. D. WYMAN, J. D. ARTHUR, ROBERT O. STURDEVANT, JOHN NIGHTINGALE, JOHN McCOMB, WM. B. PEAKE, J. L. CHAMBERLIN, JOHN DOE, RICHARD ROE, JOHN SMITH, defendants.	Complaint, Sept. 11th, 1855.

The said plaintiff, who is a citizen and resident of the State of Missouri, complains of the said defendants, who are citizens and residents of the State of California, and says, that heretofore, to wit, on the 26th day of March, A. D. 1851, the said State of California was seized in the demesne, as of fee and right of a certain lot, piece or parcel of land, covered with water, situated in the city of San Francisco, in the northern district of said State of California, bounded and described as follows, to wit: commencing at the point where the
3 southern line of Washington street intersects the western line of Davis street; thence southwardly, along said western line of Davis street, forty-five feet and ten inches; thence westwardly, parallel to said Washington street, one hundred and thirty-seven feet and six inches; thence northwardly, parallel to said Davis street, forty-five feet and ten inches, to said southern line of Washington street;

thence eastwardly, along said southern line of Washington street, one hundred and thirty-seven feet and six inches, to the place of commencement, being the same lot commonly known in said city, and represented and numbered upon the official map thereof, as beach and water lot, number four hundred and sixty-three (463;) and that afterwards, to wit, on the same day, said State of California, by act of its legislature, duly passed and entitled "An act to provide for the disposition of certain property of the State of California," granted to the said city of San Francisco the use and occupation of said land for the term of ninety-nine years from the date of said act.

And afterwards, to wit, on the 25th day of June, A. D. 1851, John C. Hays, esq., then sheriff of San Francisco county, being thereto lawfully authorized and empowered, by virtue of a
4 certain judgment against said city, before that time duly and legally rendered in the superior court of said city, (a transcript whereof had been duly theretofore filed for record, and recorded in the office of the recorder of said county,) and by virtue of legal process duly issued to enforce said judgment, and by virtue of power vested in him by law, sold, and by deed of that date duly executed, acknowledged, and recorded in the recorder's office of said county, conveyed to one John McHenry the unexpired residue of said term for ninety-nine years, vested in said city as aforesaid.

And afterwards, to wit, on the 25th day of July, A. D. 1853, the said McHenry, by deed of that date duly executed, acknowledged, and recorded in the recorder's office of said county, sold and conveyed the unexpired residue of said term to one Asa B. Bates.

And afterwards, to wit, on the 5th day of August, A. D. 1853, the said Bates, by deed of that date duly executed, acknowledged, and recorded in the same office, sold and conveyed the unexpired residue of said term to the said plaintiff, who thereby became,
5 and thence hitherto hath been, and still is, entitled to the use and occupation, rents, issues, and profits of said described premises, and of the improvements thereon situated, and appurtenances thereunto belonging.

Nevertheless, the said defendants, disregarding said plaintiff's right, afterwards, to wit, on the same day last aforesaid, wrongfully and unlawfully, and against the will and consent of said plaintiff, entered into and upon said premises, with the improvements thereon situated, and appurtenances thereunto belonging, and ejected said plaintiff therefrom, and hath thence hitherto wrongfully and unlawfully, and against the will and consent of said plaintiff, held and detained said premises, and had and enjoyed the use and occupation thereof, and taken and received to their own use the rents, issues, and profits thereof, and still so do, to the great damage of said plaintiff, to wit, to his damage five thousand dollars.

And said plaintiff avers that the use, occupation, rents, issues, and profits of said premises are, and have been since the date last aforesaid, of the monthly value of one thousand dollars.

Wherefore said plaintiff demands judgment against said
6 defendants for the possession of said premises, and for his damages aforesaid by him sustained, and for said monthly

value of said premises until possession thereof shall be delivered to him, together with his costs and disbursements in this action.

JAS. B. TOWNSEND,
S. M. BOWMAN,
Plaintiff's Attorneys.

Indorsed: Filed September 11, A. D. 1855.
GEO. PEN JOHNSON, *Clerk.*

Summons.

UNITED STATES OF AMERICA.

In the circuit court of the United States for the district of California.

MELVIN L. GRAY, plaintiff,
vs.
G. D. WYMAN *et al.*, defendants.

Action brought in the said circuit court, and the complaint
7 filed in the city and county of San Francisco in the office of the clerk of said circuit court.

The President of the United States of America, greeting:

To G. D. Wyman, J. D. Arthur, Robert O. Sturdevant, John Nightingale, John McComb, Wm. B. Peake, J. L. Chamberlin, John Doe, Richard Roe, John Smith:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the circuit court of the United States for the districts of California, and to file your plea, answer, or demurrer to the complaint filed therein (a copy of which accompanies this summons) in the office of the clerk of said court in the city and county of San Francisco within ten days (exclusive of Sundays and the day of service) after the service on you of this summons, if served within this county; or if served out of this county, then within forty days, or judgment by default will be taken against you. The said action is brought to recover possession of a certain lot, piece or parcel of land covered with water, situated in the city of San Francisco, commonly known in said city and represented and numbered upon the
8 official map thereof as beach and water lot, number four hundred and sixty-three, (463,) more particularly described in the complaint; also five thousand dollars damages, and the monthly value of said premises until possession thereof shall be delivered to plaintiff; also costs and disbursements in this action; and if you fail to appear, plead, answer, or demur as herein required, judgment by default will be entered against you and each of you

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States of America, this eleventh day of September, in the year of our Lord one thousand eight hundred and fifty-five, and of our independence the eightieth.

[SEAL.]

Attest: GEO. PEN JOHNSTON, *Clerk.*

Indorsed.

Office of the marshal of the northern district of California, *ss:*

I hereby certify that I received the within summons on the 12th day of September, A. D. 1855, and personally served the same,
9 on the 13th day of September, A. D. 1855, on G. D. Wyman, Robert O. Sturdevant, John Nightingale, John McComb, John Doe, Wm. B. Peake, (and on J. D. Arthur, September 15,) by delivering to said defendants, personally, in the city of San Francisco, a copy of said summons; a certified copy of the complaint being served by me on Wm. B. Peake, one of the said defendants, and all of them being residents of said city and within three miles of the U. S. circuit court-house.

Dated San Francisco, this twenty-fifth day of September, A. D. 1855.

W. H. RICHARDSON, *Marshal.*
By J. E. TERRELL, *Deputy Marshal.*

Filed this 26th day of September, A. D. 1855.
GEO. PEN JOHNSON, *Clerk.*

And afterwards, to wit, on the 19th day of September, A. D.
10 1855, came the defendants by their attorneys, and filed the following pleas, to wit:

Pleas of defendants.

In the circuit court of the United States for the districts of California.

MELVIN L. GRAY
vs.
G. D. WYMAN *et al.*

And now come the said defendants, and pray judgment of the said writ and complaint, because they say that, before the commencement of this suit, to wit, on the 21st day of April, 1855, in the said circuit court of the United States for the districts of California, the said plaintiff impleaded the said defendants G. D. Wyman and others, and exhibited his certain complaint against them upon and for the same identical supposed cause of action in the said complaint in the present suit mentioned, as by the record and proceedings thereof remaining in the said circuit court more fully appears; and the said defendants
11 further say that the said former suit, so brought and prosecuted against the said defendants by the said plaintiff as aforesaid, is still depending in the said circuit court, and this the said defendants are ready to verify; wherefore they pray judgment of the said writ and complaint in this suit, and that the same may be quashed, &c.

And for a further plea in this behalf, the said defendants pray judgment of the said writ and complaint, because they say that the said deed of the premises mentioned in said complaint from the said John McHenry, a citizen of the State of California, to the said Asa B. Bates, and the said deed from said Bates to the said plaintiff, were

made and executed, and the said premises were so conveyed to the said plaintiff for no other purpose than to give jurisdiction to the courts of the United States then and thereafter to be established in the said State of California.

And the said defendants further say that, according to the Constitution and laws of the United States, a citizen or citizens of California cannot be impleaded or compelled to answer by another citizen
12 of the same State before the said circuit court of the United States, but only in the courts of the State having competent jurisdiction of the case; and that the aforesaid conveyances of said premises from said McHenry to said Bates, and from said Bates to said plaintiff, for the purpose aforesaid, were and are in fraud of the said Constitution and laws of the United States, and this they are ready to verify; wherefore they pray judgment if they ought to be compelled to answer the said complaint of the said plaintiff, and that the same, together with said writ, be quashed, &c.

And for a further plea in this behalf, the said defendants say that they, the said defendants, and those under whom they claim, have been in the possession of the premises described in said complaint for a period of more than five years next immediately preceding the commencement of this suit, and this they are ready to verify.

And for a further plea in this behalf, the said defendants say that they deny all and singular the matters and allegations in the
13 said complaint contained, in manner and form as the same are therein set forth and alleged, and for the trial thereof they put themselves upon the country.

Wherefore said defendants pray to be hence dismissed, with costs, &c.

LOCKWOOD, TYLER & WALLACE,
Defendants' Attorneys.

Indorsed: Filed September 19, 1855.
GEORGE PEN JOHNSON, *Clerk.*

And afterwards, to wit, on the 9th day of November, A. D. 1855, came the plaintiff, by his attorneys, and filed the following demurrer to defendants' pleas, to wit:

Demurrer to defendants' pleas.

In the circuit court of the United States for the districts of California.

MELVIN L. GRAY, plaintiff,
vs.
G. D. WYMAN and others, def'ts. } Nov. 8, 1855.

14 And the said plaintiff says that the matters and things contained in the plea by said defendants thirdly above pleaded are not sufficient in law to bar him, said plaintiff, from maintaining his said action against them, and for cause of demurrer specifies as follows:

1st. That it is not alleged in said plea that the possession of said defendants, and of those under whom they claim therein stated, has been during said five years and upwards *adverse* to the title of said plaintiff and of those under whom he claims.

2d. That five years' possession, were it alleged to have been adverse, is no bar against the State of California, and that it is not stated or shown by said plea that said possession has continued for five years since the day on which the said term for ninety-nine years was granted by said State.

3d. That said plea does not show that said possession has been actual, notorious, quiet, peaceable, exclusive, continuous, and
15 uninterrupted during said "five years and more."

TOWNSEND & BOWMAN,
Plaintiff's Attorneys.

Indorsed.

Service of a copy of the within demurrer is hereby admitted.

LOCKWOOD, TYLER & WALLACE,
Attorneys for Defendants.

NOVEMBER 9, 1855.

Filed November 9, A. D. 1855.

GEO. PEN JOHNSON, *Clerk.*

And afterwards, to wit, on the 15th day of November, A. D. 1855, came the defendants, by their attorneys, and filed the following joinder in demurrer, to wit:

Joinder in demurrer.

In the circuit court of the United States for the districts of California.

G. D. WYMAN and others *ads.*
MELVIN L. GRAY.

16 And the said defendants say, that their said plea by them (thirdly) above pleaded, and the matters therein contained in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiff from having or maintaining his aforesaid action thereof, against them, the said defendants, and the said defendants are ready to verify and prove the same, when, where, and in such manner as the said court here shall direct and award. Wherefore, inasmuch as the said plaintiff hath not answered the said pleas, nor hitherto in any manner denied the same, the said defendants pray judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against the said defendants, &c.

LOCKWOOD, TYLER & WALLACE,
Defendants' Attorneys.

Indorsed: Filed November 15, A. D. 1855.
GEO. PEN JOHNSTON, *Clerk.*

17 And afterwards, to wit, on the 21st day of December, A. D. 1855, the following order was entered of record, to wit:

Order to enter judgment on demurrer.

At a stated term of the circuit court of the United States of America for the districts of California, held at the court-house, in the city of San Francisco, on Friday, the 21st day of December, in the year of our Lord one thousand eight hundred and fifty-five.

Present: Honorable M. Hall McAllister, judge of said court.

M. L. GRAY
vs.
G. D. WYMAN *et al.*

On motion of J. B. Townsend, esq., attorney for plaintiff, it is ordered that the judgment upon the demurrer filed in this cause heretofore rendered, to wit, on Wednesday, the 5th day of December, A. D. 1855, and not entered upon the minutes of this court, be entered "*nunc pro tunc.*"

Indorsed: Filed 21st day of December, A. D. 1855.
GEO. PEN JOHNSTON, *Clerk.*

18 And afterwards, to wit, on the 31st day of August, A. D. 1857, the defendants filed the following substitution of attorney, to wit:

Substitution of attorney.

In the United States circuit court in for the northern district of the State of California.

MELVIN L. GRAY
vs.
G. D. WYMAN *et al.*

It is hereby stipulated that C. H. S. Williams, esq., be substituted in the place and stead of the undersigned as attorney for the defendants in the above entitled cause.

Dated San Francisco, August 31, 1857.
LOCKWOOD, TYLER & WALLACE.

Indorsed: Filed August 31, 1857.
GEO. PEN JOHNSTON, *Clerk.*

19 And afterwards, to wit, on the 9th day of September, A. D. 1859, the following judgment was duly entered of record, to wit:

Judgment on demurrer.

At a regular term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Friday, the 9th day of September, in the year of our Lord one thousand eight hundred and fifty-nine.

Present: The honorable M. Hall McAllister, judge of said court.

M. L. GRAY
vs.
G. D. WYMAN *et al.*

And now at this day the demurrer of said plaintiff to the 3d plea of said defendants, filed herein, having been heretofore argued and submitted to the court for its decision, and the court having maturely considered the same, now on this 5th day of December, A. D. 1855, files its written opinion thereon, and orders that said demurrer be sustained, and adjudges said plea to be insufficient to bar said
20 plaintiff from maintaining his said action.

The foregoing judgment is entered "nunc pro tunc" by order of the court made and entered December 21st, A. D. 1855.

Indorsed: Filed this 9th day of Sept'r, 1859.
GEO. PEN JOHNSTON, *Clerk*,
By CUTLER McALLISTER, *Dep. Clerk*.

And afterwards, to wit, on the 17th day of October, A. D. 1859, the following order was entered of record, to wit:

Order to amend complaint.

At a special term of the circuit court of the United States of America for the districts of California, in and for the northern district, held at the court-house in the city of San Francisco, on Monday, the 17th day of October, in the year of our Lord one thousand eight hundred and fifty-nine.

Present: The honorable M. Hall McAllister, judge of said court.

21 MELVIN L. GRAY
vs.
G. D. WYMAN *et al.*
At common law.

And now at this day, on motion of the att'y for the pl'ff in this cause, it is ordered that plaintiff have leave to amend his complaint in accordance with agreement; which agreement is thereupon ordered to be filed.

Indorsed: Filed this 17th day of October, 1859.
GEO. PEN JOHNSTON, *Clerk*,
By CUTLER McALLISTER, *Dep. Clerk*.

And on the same day the following agreement was filed in this cause, to wit:

Agreement for amendment of complaint.

In the circuit court of the United States for the districts of California; northern district of California.

MELVIN L. GRAY
vs.
G. D. WYMAN *et al.*

22 The plaintiff's complaint in the above-entitled action is, by consent, hereby amended by the insertion on the fourth page, at the end of the second line, of the words, "and that said plaintiff, on said 5th day of August, A. D. 1853, was in possession of said premises."

SEPTEMBER 27, 1859.

CHAS. H. S. WILLIAMS,
For Def'ts.
JAS. B. TOWNSEND,
Att'y for Pl'ff.

Indorsed: Filed October 17, 1859.
GEO. PEN JOHNSTON, *Clerk*,
By CUTLER McALLISTER, *Dep. Clerk.*

And afterwards, to wit, on the 23d day of April, A. D. 1861, the following substitution of attorney was filed in this cause, to wit:

Substitution of attorney.

U. S. circuit court for the northern district of California.

MELVIN L. GRAY
vs.
G. D. WYMAN *et al.*

23 It is hereby stipulated that F. M. Haight, esq., be substituted for Charles H. S. Williams, esq., as attorney of record for the defendants in the above-entitled action.

SAN FRANCISCO, *April* 16, 1861.

F. M. HAIGHT.

I consent to the substitution mentioned above.
CHARLES H. S. WILLIAMS.

Indorsed: Filed April 23, 1861.
CUTLER McALLISTER, *Clerk.*

And now on this 23d day of April, the following proceedings were had in this cause, in open court, and entered upon the records of said court, to wit:

Proceedings in court.

MELVIN L. GRAY
vs.
G. D. WYMAN *et al.* } At common law.

And now at this day come the parties to this cause by their respective attorneys, and also come the jurors heretofore summoned
24 herein, and the following were duly sworn and impanelled "the issue to try, &c.," to wit: Alex. F. Platt, Milo Calkins, W. W. Handy, C. H. Ruffin, H. M. Hill, C. L. White, J. D. Bowers, Byron Lilly, E. N. Denton, J. H. Cutter, Niles Mills; the panel being exhausted, on motion of J. B. Townsend, attorney for plaintiff, it is ordered that an alias venire for five good and lawful men to serve as trial jurors, issue herein returnable immediately.

And now at this day come the jurors into court who were summoned upon the alias venire, and the following named juror was sworn and impanelled "the issue to try, &c.," to wit: A. P. Turner; the panel being filled, the case was opened by J. B. Townsend, esq., for plaintiff; the plaintiff having closed his testimony, the cause was opened by F. M. Haight, esq., for defendants. J. D. Stevenson and Milo Calkin were sworn and examined on behalf of defendants; there not being time to conclude the hearing of this cause, the same was adjourned until to-morrow, Wednesday, April 24, at 12 o'clock m.

25 *Further proceedings in court.*

MELVIN L. GRAY
vs.
G. D. WYMAN *et al.* } At common law.

WEDNESDAY, *April* 24, 1861.

Cause continued from yesterday.

And now at this day come the parties to this cause by their respective attorneys; also come the jurors heretofore duly impanelled herein, and the cause was proceeded with. George H. Russell, C. V. Gillespie, William S. Clark, Robert A. Parker, were sworn and examined as witnesses for the defendants. There not being time to conclude, the hearing of this cause was continued until to-morrow, Thursday, April 25th, 1861.

Further proceedings in court.

MELVIN L. GRAY
vs.
G. D. WYMAN *et al.* } At common law.

THURSDAY, *April* 25, 1861.

Cause continued from yesterday.

And now at this day come the parties to this cause by their respective attorneys; and also come the jurors heretofore impanelled herein,

and the trial of the cause was proceeded with. George Hyde
26 was sworn and examined as a witness on behalf of the plaintiff.

And now at this day, on motion of attorney for plaintiff, it is ordered that an attachment issue for T. M. Leavenworth and Milo Hoadly, defaulting witnesses.

Further proceedings in court.

MELVIN L. GRAY
vs. } At common law.
G. D. WYMAN *et al.*

MAY 1, 1861.

And now at this day come the parties to this cause by their respective attorneys; and also come the jurors heretofore impanelled herein, and the trial of this cause was proceeded with. Milo Hoadly, H. L. Dodge, Charles L. Ross, Samuel Brannan, and T. M Leavenworth were sworn and examined in behalf of the plaintiff. Cause continued until to-morrow.

Further p court.

MELVIN L. GRAY
vs. } At common law.
G. D. WYMAN *et al.*

THURSDAY, *May* 2, 1861.

27 And now at this day come the parties to this cause by their respective attorneys; and also come the jurors heretofore impanelled herein, and the testimony on both sides being closed, the cause was argued to the court and jury by J. B. Townsend, esq., for plaintiff, and by F. M. Haight, esq., for defendants. There not being time to conclude the argument of said cause, the same was continued until to-morrow.

Further proceedings in court.

MELVIN L. GRAY
vs. } At common law.
G. D. WYMAN *et al.*

FRIDAY, *May* 3, 1861.

Cause continued from yesterday.

And now, at this day, come the parties to this cause by their respective attorneys; also come the jurors heretofore impanelled herein. The argument of the cause was closed by J. B. Townsend, esq., for plaintiff The court having charged the jury upon the law of the case, the jurors retired into their room to consult upon their verdict, in charge of the proper officer.

And now, at this day, come the jurors aforesaid into court,
28 and through their foreman do say: "We, the jurors in the case of Gray *vs.* Wyman *et al.*, find in favor of the defendants.

"MILO CALKIN, *Foreman.*

"SAN FRANCISCO, *May* 3, 1861."

And afterwards, to wit, on the 3d day of May aforesaid, judgment was entered in this cause in the words, terms, and figures following, to wit:

Judgment.

United States of America, State of California, and northern district of said State.

In the circuit court of the United States for the districts of California, northern district.

MELVIN L. GRAY *vs.* G. D. WYMAN, J. D. ARTHUR, ROBERT O. STURDEVANT, JOHN NIGHTINGALE, JOHN McCOMB, WM. B. PEAKE, J. L. CHAMBERLIN, JOHN DOE, RICHARD ROE, and JOHN SMITH.	Extra April Term, 1861.

29 *Judgment.*

And now, on the 23d day of April, A. D. 1861, at the term aforesaid, came the plaintiff, by J. B. Townsend, esq., his attorney, and the defendants came by F. M. Haight, esq., their attorney, and thereupon came a jury of twelve good and lawful men, to wit: Alex. F. Platt, C. H. Ruffin, J. D. Bowers, Milo Calkin, H. M. Hill, Byron Lilly, W. W. Handy, C. L. White, E. N. Denton, J. H. Cutter, Niles Mills, and A. P. Turner, who being duly elected, tried, and sworn the truth to speak upon the issues joined, took their oaths in the jury-box. The plaintiff then proceeded to adduce and read to the court and jury the evidence on his part, and the defendants also adduced and read to the court and jury the evidence on their parts. The trial having been proceeded with from day to day, and the evidence being closed on both sides, and the argument of counsel heard, the court charged the jury touching the matters of law; and the jury having retired in charge of the marshal, returned into court and rendered their verdict in the words and figures following, to wit: "We, the jurors in the case of Gray *vs.* Wyman *et al.*, find in favor of the defendants.

30 "MILO CALKIN, *Foreman.*

"SAN FRANCISCO, *May* 3, 1861."

Wherefore, by reason of the law and the premises, it is ordered, adjudged, and decreed by the court that the plaintiff, Melvin L. Gray, take nothing by reason of his action aforesaid; that the defendants, G. D. Wyman, J. D. Arthur, Robert O. Sturdevant, John Nightingale, John McComb, Wm. B. Peake, J. L. Chamberlin, John Doe, Richard Roe, and John Smith, go hence without day, and have and recover of the plaintiff their costs and disbursements in this behalf

expended, amounting to the sum of three hundred and two $\frac{80}{100}$ dollars.

Dated San Francisco, May 3d, 1861.

Indorsed: Filed May 3d, 1861.

CUTLER McALLISTER, *Clerk.*

31 And afterwards, to wit, on the 15th day of May, came the plaintiff, Melvin L. Gray, and filed his bill of exceptions in the words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States for the districts of California; northern district of California:

MELVIN L. GRAY, plaintiff, *vs.* G. D. WYMAN *et al.*, defendants. } At common law.

Be it remembered, that on the trial of the above entitled cause, before the honorable M. H. McAllister, judge of said court, and a jury impanelled and sworn to try the same, the said plaintiff, in support of said action and to maintain the issues therein on his part, introduced and read in evidence to the jury a written stipulation, signed by the attorneys and counsel for both of said parties respectively, which is in the words and figures following, to wit:

In the circuit court of the United States for the districts of California; northern district of California:

32 MELVIN L. GRAY, plaintiff, *vs.* G. D. WYMAN, J. D. ARTHUR, ROBERT O. STURDEVANT, JOHN NIGHTINGALE, JOHN MCCOMB, WM. B. PEAKE, J. L. CHAMBERLAIN, JOHN DOE, RICHARD ROE, and JOHN SMITH, defendants. } At common law.

For all the purposes of the above entitled action, it is hereby stipulated and agreed between said plaintiff and said defendants as follows, to wit:

First. That the lot of ground sued for in said action and described in said complaint, was, at the time of the admission of California into the Union as one of the United States, and likewise at the time of the passage by the California legislature of the act entitled "An act to provide for the disposition of certain property of the State of California," approved March 26, 1851, (commonly known as the San Francisco water lot act,) wholly below ordinary high-water mark, and covered by the tide waters of the bay of San Francisco, and is
33 wholly within the boundaries described in the first section of said water lot act, and one of the "San Francisco beach and water lots," as therein known and designated, and is not a part of nor included within the government reservation mentioned in the second section of said act.

Said water lot act is hereby made a part of this stipulation, and a copy thereof, certified under the great seal of the State of California to be a true copy, may be referred to and used in all stages, and for all the purposes of this action, with the same effect in all respects as if herein inserted.

Second. That the act of the California legislature entitled "An act to incorporate the city of San Francisco," passed April 15, 1850, and the act of said legislature entitled "An act to re-incorporate the city of San Francisco," passed April 15, 1851, are hereby made a part of this stipulation, and may be referred to and read from the printed statute books for the years 1850 and 1851, (respectively purporting to be published by J. Winchester and G. Kenyon Fitch, State printers,) and used in all stages, and for all the purposes of this action,
34 with the same effect in all respects as if herein inserted; and it is admitted that the people within the corporate limits of said city, as defined in said acts respectively, accepted the same and organized their municipal government and authorities thereunder and in accordance therewith, and that said lot of ground is within the corporate limits of said city as fixed by each of said acts of incorporation respectively.

Third. That defendants hereby admit such judgment, filing, and recording of a transcript thereof, writ of execution and writ of *venditioni exponas* thereon, and such proceedings thereunder and relating thereto, in all respects, as are set forth and recited in the deed, dated June 25, 1851, from John C. Hays, sheriff of San Francisco county, to John McHenry, (said deed being recorded in the office of the recorder of deeds of San Francisco county, in liber 4 of deeds, at page 613,) and that the said superior court in which said judgment was rendered was a court of competent jurisdiction, created and existing under the laws of the State of California, and said defendants waive the production of said judgment, writs and transcript above mentioned, and
35 agree that the same shall be considered in evidence on the trial of this action, without production or other proof thereof than the recitals contained in said sheriff's deed.

Fourth. Copies of deeds and powers of attorney, (except the so-called Leavenworth grant from T. M. Leavenworth to Wm. C. Parker, the deed from said Parker back to said Leavenworth, and the deed from said Leavenworth to George W. Wright,) duly certified by the recorder of San Francisco city and county, may be read in evidence by either party, where the originals are not in the possession nor in the power of such party.

Fifth. Said defendants were in possession of the premises sued for and described in the complaint at the time of the commencement of this action, holding the same adversely to said plaintiff, and said defendants may, under the pleadings herein, introduce and give any legal and competent evidence to show title in themselves, that the plaintiff has not any title, or that there is an outstanding title in any person or persons.

36 Sixth. That said defendants, and those under whom they held possession at the time of the commencement of this action, then had and held all the right, title, and interest, if any, in and to

said lot of ground, which was vested in George W. Wright and Charles T. Botts, or in either of them, prior to the commencement of this action.

Seventh. The plaintiff's claim to mesne profits shall not be tried in this action; but the right is reserved to him, if he shall think proper hereafter to bring a separate action therefor, without prejudice from anything herein contained, or from his neglect to prosecute the same in this action.

Eighth. The unexpired term of 99 years from March 26, 1851, in the premises sued for in this action, is worth more than the sum of two thousand dollars, and the monthly value of the use and occupation of the said premises is the sum of —— dollars.

Ninth. That on the trial of this cause, either party, plaintiff
37 or defendants, may read in evidence from the printed volumes known, respectively, as "Executive Document No. 17, House of Representatives, 31st Congress, 1st session," and "Executive Document No. 18, Senate, 31st Congress, 1st session," as printed and published; any instrument or document therein contained relevant to the matters in issue, and in its substance and nature competent evidence, with the same effect as though it were the original of such document or instrument.

JAS. B. TOWNSEND, *for Plaintiff.*
F. M. HAIGHT, *for Defendants.*

SAN FRANCISCO, *April* 17, 1861.

Also, said plaintiff read in evidence to the jury the first and second sections of said act of the legislature of California, passed March 26, 1851, referred to in said stipulation, and commonly known as the San Francisco water lot act, which said sections are respectively in the words and figures following, to wit:

Section 1. All the lots of land situate within the following
38 boundaries, according to the survey of the city of San Francisco, and the map or plat of the same now on record in the office of the recorder of the county of San Francisco, are known and designated in this act as the San Francisco beach and water lots, that is to say: beginning at the point where the eastern line of Simmons street intersects the southern boundary line of the city; thence northerly on the eastern line of Simmons street to the southern line of South street; thence easterly on the southern line of South street to a point three hundred and seventy-five feet easterly from Simmons street; thence at right angles to South street northerly to the eastern line of Hubbel street; thence easterly on the line of Hubbel street two hundred and seventy-five feet; thence northerly at right angles to Hubbel street to the southern side of Hooper street; thence easterly on the southern line of Hooper street to the eastern line of Fifth street; thence northerly on the eastern line of Fifth street to the southern line of Channel street; thence easterly on the southern line of Channel street to the eastern line of Third street; thence northerly
39 on the eastern line of Third street to the southern line of Berry street; thence easterly on the southern line of Berry street to the eastern line of Second street; thence northerly on the eastern line of Second street to the southern line of King street;

thence easterly on the southern line of King street three hundred and seventy-five feet; thence northerly at right angles to King street to the southern line of Townsend street; thence easterly on the southern line of Townsend street to the eastern line of First street; thence northerly on the eastern line of First street to the southern line of Brannan street; thence easterly on the southern line of Brannan street to the eastern line of Beale street; thence northerly on the easterly line of Beale street to the southern line of Bryant street; thence easterly on the southern line of Bryant street to the eastern line of Spear street; thence northerly on the eastern line of Spear street to a point within one hundred and thirty-seven and one-half feet of the southern side of Harrison street; thence easterly at right angles to Harrison street to the eastern side of Stuart street; thence northerly on the eastern line of Stuart street to the southern line of Folsom street; thence easterly on the southern line of Folsom street to
40 the eastern line of East street; thence northerly on the eastern line of East street to its point of intersection with the northern side of Jackson street; thence northerly at right angles with the northern side of Jackson street to the northern line of Pacific street; thence westerly along the northern side of Pacific street to the eastern line of Davis street; thence northerly along the eastern line of Davis to the northern line of Vallejo street; thence westerly along the northern line of Vallejo street to the eastern line of Front street; thence northerly on the eastern line of Front to the northern line of Greenwich street; thence westerly on the northern line of Greenwich street to the eastern line of Battery street; thence northerly on the eastern side of Battery street to the northern line of Lombard street; thence westerly on the northern line of Lombard to the eastern line of Sansome street; thence northerly on the eastern line of Sansome street to the northern line of Chesnut street; thence westerly on the northern line of Chesnut street to the eastern line of Montgomery street; thence northerly on the eastern line of Montgomery street to the northern line of Francisco street; thence westerly on the
41 northern line of Francisco street to the eastern line of Kearney street; thence northerly on the eastern line of Kearney street to the northern line of North Point street; thence westerly on the northern line of North Point street to the east line of Dupont street; thence northerly on the eastern line of Dupont street to the northern line of Beach street; thence westerly on the northern line of Beach street to the eastern line of Powell street; thence northerly on the eastern line of Powell street to the northern line of Jefferson street; thence westerly on the northern line of Jefferson street to the western line of Larkin street; thence following the line of ship's channel to the western boundary line of said city; thence southerly along the western boundary line of said city to the natural high-water mark; thence along the line of the said natural high-water mark to its point of intersection with the southern boundary line of said city; thence easterly along the southern boundary line of said city to its point of intersection with the eastern line of Simmons street, being the place of beginning.

42 Section 2. The use and occupation of all the land described in the first section of this act is hereby granted to the city of San Francisco for the term of ninety-nine years from the date of this act, except as hereinafter provided. All the lands mentioned in the first section of this act, which have been sold by authority of the ayuntamiento, or town or city council, or by any alcalde of the said town or city, at public auction, in accordance with the terms of the grant known as Kearney's grant to the city of San Francisco, or which have been sold or granted by any alcalde of the said city of San Francisco, and confirmed by the ayuntamiento, or town or city council thereof, and also registered or recorded in some book of record now in the office, or custody or control of the recorder of the county of San Francisco, on or before the third day of April, A. D. one thousand eight hundred and fifty, shall be, and the same are hereby, granted and confirmed to the purchaser, or purchasers, or grantees aforesaid, by the State relinquishing the use and occupation of the same,
43 and her interest therein to the said purchasers or grantees, and each of them, their heirs and assigns, or any person or persons holding under them, for the term of ninety-nine years from and after the passage of this act: *Provided*, That the city of San Francisco shall pay into the State treasury twenty-five per cent. of all moneys hereafter arising in any way from the sale or other disposition of the property described in the first section of this act, the same to be paid within twenty days after its receipt by said city.

The property known as the government reservation is exempt from the operation of this act, except that any estate held by virtue of any lease or leases executed or confirmed by any officer of the United States on behalf of the same shall be, and the same are hereby, granted and confirmed to the lessees thereof; and the written instrument, whereby such lease or leases was made, shall in all actions brought by the lessees for the recovery of the lands so demised be sufficient evidence of title and possession to enable the plaintiff to recover.

44 And said plaintiff further gave in evidence the judgment rendered in the superior court of the city of San Francisco, in favor of Peter Smith, against the said city, which is mentioned in the said stipulation, and recited in the sheriff's deed to John McHenry, hereinafter set forth; also the transcript thereof, filed for record, and recorded in the office of the recorder of deeds of San Francisco county, recited in said sheriff's deed to said McHenry.

Also the execution referred to in said stipulation and in said sheriff's deed, which said execution was issued upon said judgment, and is in the words and figures following, to wit:

STATE OF CALIFORNIA,
Superior Court of the City of San Francisco.

The people of the State of California to the sheriff of the county of San Francisco, greeting:

Whereas Peter Smith, on the 4th day of March, A. D. 1851, recovered a judgment against the city of San Francisco, in an action

wherein the said Peter Smith is plaintiff, and the said city of
45 San Francisco and M. Alsua are defendants, for the sum of forty-five thousand five hundred and thirty-eight dollars and eighty-two cents, with interest at three per cent. per month until paid, and costs of suit, and there is actually now due on the said judgment the said sum, interest and costs, which is recorded in the judgment docket of said court, page 233, and numbered 659: Now, this is to require you, the said sheriff, to satisfy the said judgment, together with interest and costs of suit, out of the personal property of the said city of San Francisco, or, if sufficient cannot be found, then out of the real property in the city of San Francisco, belonging to said city on the day when the said judgment was docketed in the aforesaid city, or at any time thereafter, and make return of this execution within forty-one days, with what you have done indorsed thereon:

Judgment	$45,538 82
Court tax	16 00
Clerk's fees	71 00
Sheriff's fees	00 00

Interest at three per cent. per month.

Witness the Hon. Hugh C. Murray, chief justice of the said
46 court, at the city of San Francisco, this tenth day of March, A. D. 1851.

[L. S.] GEORGE J. WALLACE, *Clerk.*

Also the sheriff's return made and indorsed upon said execution; which said return, so far as material to this action, is in the words and figures following, to wit:

Received this writ March 10, 1851, and by virtue of the same I levied upon the property, as described in the printed schedule annexed; and after having published the same according to law, the sale of the property was stayed by an injunction issuing out of the district court.

APRIL 3, 1851.

J. C. HAYS, *Sheriff,*
By B. F. HARLEY, *D. S.*

Printed schedule referred to above.

Sheriff's sale.

47 By virtue of an execution issued out of the superior court, city of San Francisco, county of San Francisco, and State of California, duly tested, and dated on the 10th day of March, A. D. 1851, in the case of Peter Smith against the city of San Francisco, wherein a judgment was rendered in favor of the said Smith against the said city on the 4th day of March, 1851, for the sum of forty-five thousand five hundred and thirty-eight eighty-two one-hundredths dollars, and also the sum of eighty-seven dollars costs, in this behalf expended, and also the accruing costs; and the same being to me directed and received

on the 10th day of the month and year aforesaid, and levied on the following property, to wit:

All that beach and water property, &c., * * * *
* * * * * * * *
as known and marked upon the official map of said city, &c. *
* * * * * * * * *
Also those beach and water lots known and marked upon said map as numbers * * * * * * *
* * * * * * * * *
463, &c. * * * * * * *

48 Now, know ye, that on Thursday, the 3d day of April next, in the year 1851, between the hours of 11 o'clock a. m. and 2 o'clock p. m. of said day, in front of the court-house door, corner of Clay and Kearney streets, under the proceedings had in the aforesaid case, and by authority of law, will sell the above described property to the highest bidder, for cash.

JOHN C. HAYS, *Sheriff*,
By JNO. S. POWERS, *Dep'y*.

Also said plaintiff gave in evidence the writ of *venditioni exponas*, referred to in said stipulation and sheriff's deed; which said last mentioned writ, so far as material to this action, is in the words and figures following, to wit:

STATE OF CALIFORNIA,
Superior Court of the City of San Francisco.

49 The people of the State of California to the sheriff of the county of San Francisco, greeting:

Whereas an execution against the property of the city of San Francisco for the sum of forty-five thousand five hundred and thirty-eight dollars and eighty-two cents, with interest and costs of suit, in an action wherein Peter Smith was plaintiff and the city of San Francisco and M. Alsua were defendants, and you made return thereto that you had levied on the following property, to wit: All that beach and water property lying, &c. * * * * *
* * * * * * * * * *
* * * * * * * * * *
as known and marked upon the official map of said city, &c.
* * * * * * * * * *
* * * * * * * * * *
Also those beach and water lots known and marked upon said map as numbers * * * * * * *
* * * * * * * * *
* * * * * * * * *
463, &c.
* * * * * * * * *
* * * * * * * * *

50 And that the sale of the said property was stayed by an injunction from the district court.

We command you that you cause to be sold the property so levied

on for the best price that can be got for the same, and have the money arising from such sale, or so much thereof as may be necessary to satisfy the said execution, before our justices of our said superior court of the city of San Francisco, at the city hall in said city, to render to the said plaintiff. And of this writ make legal service and due return within ninety-one days.

Witness, Hon. H. C. Murray, chief justice of said court, this 22d day of May, A. D. 1851.

[L. S.] GEORGE J. WALLACE, *Clerk.*
By H. MARSHALL, *Deputy Clerk.*

51 And said plaintiff gave in evidence the sheriff's return upon said last mentioned writ, setting forth the facts in that behalf recited in said sheriff's deed.

Said plaintiff then gave in evidence the said sheriff's deed from John C. Hays, sheriff of San Francisco county, to John McHenry, mentioned and referred to in said stipulation, which said deed, with the certificate of acknowledgment and certificate of record thereto added and thereon indorsed, is in the words and figures following, to wit:

"This indenture, made this twenty-fifth day of June, A. D. 1851, between John C. Hays, sheriff of the county of San Francisco and State of California, of the first part, and John McHenry, of the same county, of the second part, witnesseth: Whereas heretofore, to wit, on the fourth day of March, A. D. 1851, Peter Smith, plaintiff in a certain cause in the superior court of the city of San Francisco, wherein the said Peter Smith was plaintiff and the city of San Francisco and M. Alsua were defendants, did recover a judgment against
52 the said city of San Francisco in the sum of forty-five thousand five hundred and thirty-eight dollars and eighty-two cents, with interest at three per cent. per month until paid, and costs of suit, a transcript of which said judgment was afterwards, to wit, on the fourteenth day of March, A. D. 1851, duly filed for record, and the same duly recorded in the office of the recorder of said county, as will fully appear by the record thereof in book number one of Transcripts of Judgments, page 122, in the said recorder's office in the city of San Francisco. And whereas a writ of execution issued upon the said judgment, out of and under the seal of the said superior court, duly tested and dated the 10th day of March, 1851, at the suit of the said Smith and against the said city of San Francisco, directed and delivered to the said sheriff, commanding him to satisfy the said judgment, together with the interest and costs of suit, as aforesaid, out of the personal property of the said city of San Francisco, or, if sufficient could not be found, then out of the real property in the city of San Francisco belonging to said city on the day when the
53 said judgment was docketed in the aforesaid city, or any time thereafter.

And whereas, by virtue of the said execution, the said sheriff did levy on and seize all the right, title, and interest which the said defendant, the city of San Francisco, had, of, in, and to the divers lots and parcels of grounds described in the advertisement of sale made

by virtue of the said execution, among which were the premises hereinafter described and conveyed, and did duly advertise the same according to law, to be sold at public sale in front of the court-house door, corner of Clay and Kearney streets, between the hours of 11 o'clock a. m. and 2 o'clock p. m. of Thursday, the 3d day of April, A. D. 1851.

And whereas on the day for which the said sale was advertised to take place, and before the hour appointed for said sale, the same was stayed and restrained by an injunction issued at the order of Hon. R. N. Morrison, the judge of the county court of said county, in a certain cause then pending in the district court of the fourth judicial district,
at the suit of John W. Geary and others, against the said
54 plaintiff and others, bearing date the twenty-ninth day of March, A. D. 1851, which said injunction was afterwards dissolved, and afterwards another injunction issued out of the said district court at the suit of said parties in the same cause, which was, in like manner, also dissolved and vacated.

And whereas the said sheriff did afterwards make his return accordingly, as will more fully appear by reference to the said execution, so returned and now on file, and in the office of the clerk of the superior court, bearing date the third day of April, A. D. 1851.

And whereas another execution, commonly called a *venditioni exponas*, was issued upon the said judgment and the aforesaid return of the first above-mentioned execution, out of and under the seal of the said superior court, dated and tested the 22d day of May, 1851, commanding the said sheriff that he cause to be sold the property so levied on for the best price that could be got for the same, and have the moneys arising from such sale, or so much thereof as might be necessary to satisfy the said judgment, &c.

55 And whereas the said John C. Hays, as sheriff as aforesaid, did advertise the said property mentioned in the advertisement of sale, in pursuance of the last mentioned writ, according to law, to be sold in front of the court-house, in the city of San Francisco, on Saturday, the 14th day of June, A. D. 1851, at the hour of 11 o'clock a. m , at which time and place the said sheriff did offer the same at public sale and outcry; and whereas John Vandewater having then and there bid for lot number thirty-nine, (39,) and the proprietors of the Polka House for lot number ninety-eight, (98,) and James Gallagher for lot number ninety-nine, (99,) and F. C. Chase for lot number one hundred and ten, (110,) and W. M. Fulton for lot number three hundred and twenty, (320,) and J. F. Atwill for lot number four hundred and sixty-three, (463,) and Samuel W. Haight for block number thirteen, (13,) and D. J. Thomas block number fourteen, (14,) and
G. R. Morris block number fifteen, (15,) and James Hutton
56 for block number seventeen, (17,) which said property forms a part of the premises, lots, and parcels of ground mentioned in said advertisement, by virtue of said last mentioned writ, the sums of money mentioned in my return to said writ, and they being the highest bidders therefor, said lots and blocks were struck off to them ; but they having failed to comply with the terms of said sale, I, the said John C. Hays, sheriff as aforesaid, advertised said property for resale

according to law, on the 25th day of June, 1851, in the city of San Francisco, in front of the court-house, on the ——— day of ———, at eleven o'clock a. m., and at which time and place the said sheriff did offer the same at public sale and outcry; and John McHenry having then and there bid for said lots and blocks of land known by the aforesaid numbers as beach and water lots (except the lot number one hundred and ten, on Montgomery street, which is believed to have been a beach and water lot on the official map of the city of San Francisco, deposited in the office of the surveyor of said city,) and all said blocks of water property lying and being between Folsom
57 street and the north ship channel on the east to the city limits on the south, and Price street on the west, said blocks being a portion of the blocks numbering from one to thirty-two on the aforesaid map, which said property is set forth and forms a part of the premises, lots, and parcels of ground mentioned in said advertisement, made in pursuance and by virtue of said last mentioned writ, the sum of eighteen hundred and ten dollars; and he then and there, being the highest bidder therefor, the said sheriff did strike off the same to him, and he then and there became the purchaser thereof.

Now this indenture witnesseth, that the said John C. Hays, as sheriff of the county of San Francisco, and by virtue of the power in him vested, and of the said executions to him directed, and for and in consideration of the sum of eighteen hundred and ten dollars, to him in hand paid by the said John McHenry, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, and convey unto the
58 said John McHenry, and to his heirs and assigns forever, all the estate, right, title, and interest which the said city of San Francisco had at the time of the filing of the transcript of the said judgment in the recorder's office as aforesaid, or at any time afterwards had, of, in, and to the above described land and premises; to have and to hold the said premises to the said John McHenry, his heirs, and assigns forever, as fully and absolutely as he, the said John C. Hays, as sheriff as aforesaid, may or can lawfully sell or convey the same.

In witness whereof, the said John C. Hays, sheriff as aforesaid, [L. S.] has hereunto set his hand and seal the day and year first above written.

JOHN C. HAYS, *Sheriff.*

Signed, sealed, and delivered in presence of—
THOS. P. JOHNSON.

STATE OF CALIFORNIA,
County of San Francisco, sct.

On this 18th day of July, A. D. 1851, before me, James Van Ness, a notary public, duly qualified, in and for said county, per-
59 sonally appeared John C. Hays, sheriff of the county aforesaid, known to me to be the person described in, and who executed the foregoing instrument, who acknowledged to me that he executed

the same as sheriff as aforesaid freely and voluntarily, and for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and private seal (having as yet no official seal) on the day and year last above written.

[L. S.] JAMES VAN NESS,
Notary Public.

Recorded in the office of the county recorder of San Francisco, lib. 4 of deeds, page 613, July 19, 1851, at 9 o'clock a. m.

JOHN A. McGLYNN, *County Recorder*,
By JAS. O. GRADY, *Deputy.*

The said defendants, by their counsel, admitting that said deed includes the lot in dispute and sued for in this action.

Said plaintiff likewise gave in evidence a deed of conveyance
60 of the lot in dispute, dated July 25, 1853, duly executed, acknowledged, and recorded, from the said McHenry to one Asa B. Bates, and a like deed for said lot from the said Bates to the said plaintiff herein, dated August 5, 1853.

The defendants then introduced evidence for the purpose of showing a grant by an alcalde, a confirmation thereof by a town council, and a registry or record thereof before the 3d day of April A. D. 1850, in a book of record, which was deposited in the recorder's office of San Francisco county on the 26th day of March, 1851; and the plaintiff, in rebuttal thereof, gave evidence tending to show that said grant, by reason of uncertainty as to the land purporting to be granted therein, and its non-conformity to the survey of the city of San Francisco and to the map or plat of the same, referred to in the first section of said water lot act, was not a grant of the lot in dispute, and likewise tending to show that said grant had not been confirmed by any
61 ayuntamiento or town council of San Francisco, but no further evidence was given by either party bearing upon or affecting the title upon which said plaintiff had rested.

Said evidence having been concluded, the court, of its own motion, charged the jury in regard to the mode of acquisition by the State of California of title to the lands covered by tide-waters within her limits, but gave them no charge of its own motion in regard to the derivative title which the plaintiff had shown under and as acquired from the city of San Francisco.

Thereupon said plaintiff prayed the court to instruct the jury as follows, to wit:

"The judgment in the case of Peter Smith against the city of San Francisco, the transcript thereof filed in the recorder's office of San Francisco county, and the execution and *venditioni exponas* given in evidence by the plaintiff, authorized and empowered the sheriff to sell and convey not only the right, title, estate, interest, and property in the lot in dispute, which the city of San Francisco had at the
62 time of the filing of said transcript, but likewise all which it acquired at any time thereafter down to the day of said sheriff's sale."

Which instruction the said court refused to give to the jury, to which refusal said plaintiff then and there excepted.

Said plaintiff likewise prayed the court to give to the jury the following instruction, to wit:

"The evidence of title in the plaintiff given by him on this trial is sufficient to entitle him to recover the lot sued for, unless the jury find from the evidence that said lot was sold or granted by an alcalde of the city of San Francisco, and confirmed by the ayuntamiento or town or city council thereof, and also on or before the 3d day of April, A. D. 1850, registered or recorded in some book of record which was in the office, custody or control of the recorder of the county of San Francisco on the 26th day of March, 1851."

Which instruction the court likewise refused to give, to which refusal the said plaintiff then and there excepted.

63 And upon the prayer of said defendants the court then and there gave to the jury the following instruction, to wit:

"1. If the jury find from the evidence that the transcript of the judgment under which plaintiff claims was filed before the 26th day of March, 1851, an execution and levy made prior to the same day under the law as then existing, no title or interest was acquired in the land in controversy by such judgment and levy, the city not having acquired any title until the 26th day of March, 1851."

To the giving of which last recited instruction said plaintiff at the proper time objected, but the court overruled said objection; to which ruling, and to the giving of said instruction, said plaintiff then and there duly excepted.

And upon the prayer of said defendants the court likewise gave to the jury the following further instruction, to wit:

"2. The *venditioni exponas* did not authorize the sale of any
64 property except that previously levied on under the execution issued the 10th day of March of 1851. The return of a levy on it is no evidence, because no levy was authorized, and at date of levy the city of San Francisco had no title."

To the giving of which last recited instruction the plaintiff in like manner objected, but the court overruled said objection; to which ruling, and to the giving of said instruction, the said plaintiff then and there duly excepted.

And upon like prayer of said defendants the court gave to the jury the following further instruction, to wit:

"3. If the jury find the execution on the judgment of Peter Smith *vs.* the City of San Francisco was issued before the 14th March, 1851, and levy made before that day, then the execution did not create any lien or title or interest in the land in controversy, for the reason the defendant had no title or interest in the land at the time of the issuing and levy of the execution, and to sell an after acquired title would render a levy necessary after the date of such after acquired title."

To the giving of which last recited instruction the plaintiff
65 in like manner objected, but the court overruled said objection; to which ruling, and to the giving of said instruction, the said plaintiff then and there duly excepted.

These were all the instructions given by the court upon the plaintiff's title as derived from the city of San Francisco.

The jury found for the defendants, upon which verdict judgment was entered.

The plaintiff prays that this his bill of exceptions be signed and sealed by the court and made part of the record of this action, which is done accordingly.

M. HALL McALLISTER, [SEAL.]
Judge Circuit Court U. S. for the Districts of California.

Indorsed: Filed May 15, 1861.
CUTLER McALLISTER, *Clerk.*

66 And afterwards, to wit, on the 13th day of May, the following precipe for writ of error was filed in this court, to wit:

Precipe for writ of error.

In U. S. circuit court for the districts of California, northern district of California.

MELVIN L. GRAY
vs.
G. D. WYMAN *et al.* } At common law.

The clerk will please issue a writ of error in this cause from the Supreme Court to said circuit court.

JAS. B. TOWNSEND,
Att'y for Pl'ff.

SAN FRANCISCO, *May* 13, 1861.

Indorsed: Filed May 13, 1861.
CUTLER McALLISTER, *Clerk.*

67 And afterwards, to wit, on the thirty-first day of May, A. D. 1861, the following citation was duly issued in said cause, to wit:

Citation.

UNITED STATES OF AMERICA, *ss:*

To G. D. Wyman, J. D. Arthur, Robert O. Sturdevent, John Nightingale, John McComb, Wm. B. Peake, J. L. Chamberlain, John Doe, Richard Roe, and John Smith, greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the districts of California, northern district, wherein Melvin L. Gray is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and full and speedy justice done to the parties in that behalf.

Witness the honorable M. H. McAllister, judge of United
68 States circuit court for the districts of California, this thirty-first day of May, A. D. 1861.

M. HALL McALLISTER,
Judge Circuit Court, U. S. Districts of California.

Indorsed: I acknowledge due service of the foregoing citation, by copy, this 8th day of June, A. D. 1861.

F. M. HAIGHT,
Att'y and counsel for above-named defendants in error.

Filed June 8, 1861.

CUTLER McALLISTER, *Clerk.*

Bond on appeal.

In the circuit court of the United States for the districts of California, northern district of California.

MELVIN L. GRAY, pl'ff in error, *vs.* G. D. WYMAN, J. D. ARTHUR, ROBERT O. STURDEVANT, JOHN NIGHTINGALE, JOHN McCOMB, 69 WM. B. PEAKE, J. L. CHAMBERLAIN, JOHN DOE, RICHARD ROE, and JOHN SMITH.	At common law.

Know all men by these presents that we, David D. Calton and George Scott, of the city and county of San Francisco, are held and firmly bound unto the above-named defendants in error in the sum of four hundred dollars, lawful money of the United States, to be paid to them, their heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our respective heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this eighteenth day of May, A. D. 1861.

The condition of this obligation is such, that whereas the above-named Melvin L. Gray has sued out a writ of error from the Supreme Court of the United States to said circuit court, to reverse the judgment rendered by said circuit court in the above entitled cause in favor of said defendants:

70 Now, if the said Melvin L. Gray shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then this obligation shall be void; otherwise to remain in force.

DAVID D. CALTON. [SEAL.]
GEORGE SCOTT. [SEAL.]

Executed and delivered in presence of—
JAS. B. TOWNSEND.

NORTHERN DISTRICT OF CALIFORNIA, *ss.*

David D. Calton and George Scott, each for himself, deposes and says that he is worth the sum of eight hundred dollars over and above all his just debts and liabilities, and property exempt from execution.

GEORGE SCOTT.
D. D. CALTON.

Subscribed and sworn to before me this 23d day of May, A. D. 1861.

CLINTON PALMER, [SEAL.]
Notary Public.

Bond approved.

M. HALL McALLISTER,
Judge Cir. C't U. S., Dist's of Cal'a.

Indorsed: Filed May 23, 1861.

CUTLER McALLISTER, *Clerk.*

71 I, Cutler McAllister, clerk of the circuit court of the United States for the districts of California, do hereby certify that the foregoing pages, from 1 to 70 inclusive, contain a full, correct, and faithful transcript of the record of the proceedings had in the above entitled cause, returned in accordance with the annexed writ of error.

Witness my hand and the seal of said court this 19th day of June, A. D. 1861.

[SEAL]

CUTLER McALLISTER, *Clerk.*

72 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the California districts, northern district, greeting:

Because in the record proceedings, as also in the rendition of a judgment on the 3d day of May, 1861, in a plea lately pending before you between Melvin L. Gray, plaintiff, against G. D. Wyman, J. D. Arthur, Robert O. Sturdevant, John Nightingale, John McComb, William B. Peake, J. L. Chamberlin, John Doe, Richard Roe, and John Smith, a manifest error hath happened to the great damage of the said plaintiff therein named, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf:

73 You are hereby commanded that if the judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, then and there to be held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Roger B. Taney, Chief Justice of the
74 said Supreme Court of the United States, this first Monday of December, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States the eighty-fifth year.

In testimony whereof, the clerk of the said circuit court hath hereunto subscribed his name and affixed the seal of the said [L. S.] United States circuit court, on this thirteenth day of May, A. D. 1861.

CUTLER McALLISTER,
Clerk Cir. C't U. S., Dist's of California.

Allowed.

M. HALL McALLISTER,
Judge Cir. C't U. S., Dist's of California.

75 UNITED STATES OF AMERICA, *ss:*

To G. D. Wyman, J. D. Arthur, Robert O. Sturdevant, John Nightingale, John McComb, William B. Peake, J. L. Chamberlin, John Doe, Richard Roe, and John Smith, greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the districts of California, northern district, wherein Melvin L. Gray is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be cor-
76 rected, and speedy justice done to the parties in that behalf.

Witness the honorable M. H. McAllister, judge of the United States circuit court for the districts of California, this thirty-first day of May, A. D. 1861.

M. HALL McALLISTER,
Judge Circuit Court U. S, Districts of California.

I acknowledge due service of the foregoing citation, by copy, this eighth day of June, A. D. 1861.

F. M. HAIGHT,
Attorney and counsel for above named defendants in error.

77 In the Supreme Court of the United States.

MELVIN L. GRAY, plaintiff in error, *vs* G. D. WYMAN *et al.*, defendants in error. } In error to the C. C. of the United States for the districts of California.

And now comes the said plaintiff, and says that in the record and proceedings of the said circuit court in said cause, and in the giving of judgment therein, there is manifest error in this, to wit:

1st. That the said circuit court refused the instructions to the jury asked by said plaintiff on the trial below; whereas it ought to have given said instructions.

2d. That the said circuit court gave to the jury the instructions

asked by said defendants on said trial; whereas it ought to have refused them.

3d. That the said circuit court gave judgment against the
78 said plaintiff, and in favor of the said defendants; whereas, by the law of the land, its judgment ought to have been in favor of the said plaintiff and against the said defendants.

And the said plaintiff in error prays that the judgment aforesaid, for the errors aforesaid, and other errors in the said record and proceedings appearing, may be reversed, annulled and held for naught, and that he be restored to all things which he hath lost thereby.

JAMES A. McDOUGALL & SHARP,
For plaintiff in error.